EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE GLOBAL BROKERAGE INC., f/k/a FXCM INC. SECURITIES LITIGATION

17 Cv. 916 (RA)

Decision

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August 19, 2022
1:00 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

THE ROSEN LAW FIRM
Attorneys for Plaintiffs
BY: PHILLIP C. KIM
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Attorneys for Defendants
BY: ISRAEL DAHAN
CHELSEA J. COREY
PETER J. ISAJIW

(The Court and parties appearing via teleconference)

THE COURT: Good morning, everyone. This is Judge Abrams. We are here for *In re Global Brokerage*.

Who do I have on the line, please.

MR. KIM: Good morning, your Honor. Phillip Kim, Rosen Law Firm, for plaintiffs.

THE COURT: Good morning.

MR. BAKER: Josh Baker, with The Rosen Law Firm, also for plaintiffs.

MR. LaPOINTE: This is Brent LaPointe, with The Rosen Law Firm, also for plaintiffs.

THE COURT: Good morning.

MS. COREY: This is Chelsea Corey, from King & Spalding, on behalf of defendants.

MR. DAHAN: Israel Dahan, from King & Spalding, also on behalf of defendants.

THE COURT: Good morning.

MR. ISAJIW: Peter Isajiw, from King & Spalding as well.

THE COURT: So, as you all know, I am denying each of FXCM's motions. I have decided to rule orally just because, since the case is going forward anyway, I think it's more efficient to do so, and that way we can move the case forward as quickly as possible.

So, I know it can be a little bit tedious to listen to

an oral ruling, but I do think that this is more efficient. I have a court reporter on the line, and you should reach out to the court reporter after the proceeding to get a transcript of my ruling.

First, I am denying FXCM's motion to exclude Dr. Werner's reports, testimony, and opinions. Most of FXCM's objections to Werner's opinions——including his use of a constant-dollar methodology, his conclusion that the February 2017 disclosures were value relevant for all class members, and his loss causation conclusions regarding 683 Capital——are better suited to challenging his credibility at trial. As I will touch on a little later, his disaggregation opinion is useful, or may be useful, to the jury, and uses reliable principles and methods in light of plaintiffs' theory of the case. Similarly, as I will explain shortly, his conclusion that the corrective disclosures are relevant to GAAP violations is based on sufficient facts.

Second, I am granting in part and denying in part the motion to exclude Barron's reports, testimony, and opinions.

As an initial matter, FXCM's arguments that Barron's VIE and related-party analyses are reductive and incomplete, and that his conclusions are unsupported by the evidence, are, again, credibility arguments rather than arguments that go to admissibility.

On materiality, while Barron may opine that the

transactions with Effex were material related-party transactions such that the failure to disclose them violated GAAP, he must be careful to avoid opining that this caused FXCM's financial statements to be materially misstated, which draws on the language of the relevant legal standard.

I do agree with FXCM that paragraphs 18 through 114 of Barron's report comprise factual narrative. Accordingly, to the extent plaintiffs were planning to introduce the report at trial, those paragraphs will need to be modified or struck if they are offered to prove the facts related therein. And I am just going to cite to the *Malletier v. Dooney & Bourke* case, 525 F.Supp.2d 558, 677-78.

And at trial, the facts on which Barron bases his opinions should be proved by admissible evidence and not expert assertion. Thus, if Barron testifies, he should not be permitted to summarize the background facts, as that will not assist the jury. And that's a quote from the same case at 677-78. In other words, the factual narrative in Barron's report should be presented to the jury through witnesses and documentary evidence, rather than through Barron's unsupported statements for the purpose of describing what took place. *See, e.g., Reach Music v. Warner Chappell Music*, 988 F.Supp.2d 395, at 404.

I also agree that certain statements in Barron's report that make conclusions about the parties' intent, and/or

that characterize documents for the purposes of having the fact finder accept that interpretation as fact, should be precluded, including but not limited to paragraphs 68, 102, and 150. *See In re Rezulin Prod. Liab. Litig.*, 309 F.Supp.2d 531, at 546. At trial, Barron must avoid opining on any parties' intent and must avoid characterizing any documents.

Next, I am denying FXCM's summary judgment motion because I find that plaintiffs have raised genuine issues of material fact as to the disputed elements of their fraud claims.

To prevail on summary judgment, FXCM must show that there is no genuine dispute as to any material fact. A fact is material when it might affect the outcome of the suit under the governing law. An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

I must resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.

To prevail on their claim under Section 10(b) and Rule 10b-5, plaintiffs must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. The

parties dispute the first, second, fifth, and sixth prongs.

On the first disputed element, there is sufficient evidence from which a reasonable juror could find that FXCM made material misrepresentations with respect to (1) its statements about receiving revenue from order-flow payments; (2) its failure to disclose Effex as a related party; and (3) its statements that it operated under an agency trading model.

In addition to statements that are untrue, the securities laws prohibit half-truths, which are statements that are misleading by virtue of what they omit to disclose.

First, there is evidence from which a reasonable juror could conclude that the payment arrangement between FXCM and Effex was a profit-sharing arrangement, such that FXCM's statements about revenue from order-flow payments were false or misleading.

Communications between Effex and FXCM express the intent that the payment arrangement between the two would mirror the 70/30 profit split from Dittami's employment agreement.

Niv's and Dittami's CFTC testimony further supports this inference——indeed, when asked whether the services agreement was intended to approximate that 70/30 profit split, they repeatedly answered in the affirmative.

Multiple communications between FXCM and Effex appear to contemplate that Effex's payments under the service

agreement would be tied to its profits. For instance, in a May 11, 2010 e-mail, Dittami asked Ahdout how certain funds "should be handled in conjunction with the payment on my profits to FXCM." In a July 2010 message, an FXCM employee told Dittami, "We'll still be tracking your expenses and income for now so that we can see if the $21 fee should be adjusted." And in an October 2010 e-mail, Dittami sent Ahdout a draft of a side letter to the service agreement that would have stated that the "per million" fee would not exceed 70 percent.

Several of FXCM's invoices to Effex used the term "P&L," or "profit and loss," when calculating the amount Effex owed to FXCM. FXCM argued that this referred to FXCM's profits, but a reasonable juror could find otherwise.

And e-mail discussions indicate that discretion was exercised on whether to include certain of Effex's income streams as "volume" for the purpose of calculating Effex's payments.

Taken together, this evidence could support a finding that the payment arrangement between FXCM and Effex was a profit-sharing arrangement disguised as an order-flow payment arrangement.

Second, there is evidence from which a reasonable juror could conclude that FXCM made false or misleading statements by not disclosing material related-party transactions.

According to the accounting standard that controls here, related parties include "other parties with which the reporting entity may deal if one party controls or can significantly influence the management or operating policies of the other to an extent that one of the transacting parties might be prevented from fully pursuing its own separate interests," and "other parties that can significantly influence the management or operating policies of the transacting parties or that have an ownership interest in one of the transacting parties and can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests." A juror could conclude that Effex was so closely related to and/or controlled by FXCM that it was a related party, at least under one of these definitions.

First, there is a dispute as to whether an option agreement existed pursuant to which FXCM could buy 70 percent of Effex, and thus whether FXCM had an ownership interest in Effex. Plaintiffs point to a signed option agreement dated April 14, 2010. FXCM disputes that agreement's validity, but multiple communications between the parties suggest that they understood the agreement to be enforceable.

I am just going to quickly cite -- I am not reading a lot of the citations, again, just for efficiency, because I think you are very familiar with the record. But I am looking

at Exhibit 33, Exhibit 107, Exhibit 109.

It is also undisputed that in Effex's early stages: (1) it operated its trading algorithm through FXCM servers and on its network and relied on its IT; (2) it operated out of FXCM's offices rent free; (3) it used FXCM servers and used FXCM's messaging service; (4) Dittami and other Effex employees kept VPN access to FXCM computers; (5) FXCM employees performed work for Effex and Effex paid those employees bonus for that work; and (6) Dittami used an FXCM e-mail address for months after his employment with FXCM terminated.

Finally, there is evidence that FXCM comprised 50 to 80 percent of Effex's revenues as late as 2014.

These facts speak to FXCM's control over Effex and the extent to which Effex was able to pursue its own interests. They thus create a genuine dispute as to whether FXCM violated GAAP by failing to disclose its transactions with Effex as material related-party transactions——and financial statements that are not prepared in accordance with GAAP are presumptively misleading or inaccurate.

FXCM also relies on Ernst & Young's opinion that FXCM did not need to disclose Effex as a related party, even after the firm became aware of the regulatory settlements.

But there is no rule FXCM cites that an auditor's opinion on whether GAAP was violated is conclusive on that issue. While this memo supports FXCM's position, it will be

weighed by the fact finder against contrary evidence. Further, in reaching its GAAP opinion, Ernst & Young concluded that "the option was never in force or effect," an issue on which there is a genuine dispute.

Given this finding, I need not consider whether there is evidence that Effex was a VIE.

Third, in light of all this evidence, a juror could conclude that FXCM made false or misleading statements by stating it operated under an agency model.

The evidence of a profit-sharing agreement suggests that FXCM benefited when Effex benefited. And Effex, in turn, traded opposite FXCM's retail customers and had the potential to benefit from customer losses. Thus, there is evidence that FXCM effectively benefited from its customer losses, which contravenes the concept underlying the agency model of trading.

In other words, even if FXCM still met the formal requirements of an agency model, telling investors it operated under an agency model could have created a misleading impression that FXCM had nothing to gain based on whether its customers won or lost trades.

Plaintiffs have also shown sufficient evidence of scienter.

One method by which a plaintiff may show scienter is by raising strong circumstantial evidence of conscious misbehavior or recklessness.

The Second Circuit has defined reckless conduct as "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care, to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." That's from the *Rolf* case, 570 F.2d 38, at 47. Facts that meet this standard include defendants' knowledge of facts or access to information contradicting their public statements.

The record contains evidence that Niv and Ahdout, who signed the financial statements with the alleged misstatements, knew (1) that the payments from Effex were profit-sharing payments, (2) the facts relevant to FXCM's control over Effex, and (3) that through its relationship with Effex, FXCM was not truly operating under an agency model. Namely, Niv and Ahdout were parties to most of the communications and documents discussed above that detailed the nature of the relationship between Effex and FXCM. Knowledge of these facts contradicting FXCM's public statements satisfies the scienter standard.

Evidence of Niv's and Ahdout's actions and scienter may be imputed to FXCM.

I think that there is someone on the line who actually may have not muted their phone. So I am just going to ask you to do so when you're not speaking, please.

Next, I will briefly address FXCM's argument that Ernst & Young's audits of its financial statements preclude a

finding of scienter. Although good faith reliance on the advice of an accountant has been recognized as a viable defense to scienter, to establish the defense, the defendant should show that he/she/it made a complete disclosure, sought the advice as to the appropriateness of the challenged conduct, received advice that the conduct was appropriate, and relied on that advice in good faith.

Here, there are disputes as to whether Ernst & Young had all the relevant information. Plaintiffs point to an e-mail from Niv in which he instructs other employees not to mention the option contract to Ernst & Young. And deposition testimony from an Ernst & Young auditor indicates that the firm was not aware of FXCM's prior employment relationship with Dittami, or the 70/30 split those parties agreed on, until 2015 or 2016. Thus, Ernst & Young's approval of FXCM's financial statements is not determinative.

Plaintiffs have also shown sufficient evidence of loss causation.

Loss causation is analogous to the common law concept of proximate cause and requires that plaintiffs show that their loss was caused by the fraud and not by other intervening events.

Under the corrective disclosure theory of loss causation, a plaintiff must show that the market reacted negatively to a corrective disclosure, which revealed an

alleged misstatement's falsity or disclosed that allegedly material information had been omitted. Under the "materialization of risk" theory, the plaintiff must show that the alleged misstatement conceals a condition or event which then occurs and causes the plaintiff's loss.

To the extent plaintiffs raise a "materialization of risk" theory and characterize the risk as the risk of regulatory penalties, this theory fails. The risk must be concealed by the misrepresentations and omissions alleged. That's from *Lentell v. Merrill Lynch*, 396 F.3d 161, at 173. But false or misleading statements create a risk of regulatory penalties.

But plaintiffs also rely on corrective disclosure, arguing that loss causation can be shown by the market reaction to the February 2017 announcements disclosing the alleged fraud.

As a threshold matter, the settlement announcements can be corrective disclosures despite being "no admit, no deny." Courts have previously concluded that announcements of SEC investigations, which precede any findings of fact, are corrective disclosures. *See In re Bristol-Myers Squibb*, 586 F.Supp.2d 148, at 164, and *In re Take-Two Interactive Sec. Litig.*, 551 F.Supp.2d 247, at 282.

As a second threshold point, a juror could find that the disclosures revealed the alleged GAAP violations. The CFTC

release stated that Effex remained closely aligned with FXCM, received special trading privileges, benefited from a no-interest loan provided by FXCM, worked out of FXCM's offices, and used FXCM employees to conduct its business. It also stated that FXCM actually supported and controlled Effex. These statements are sufficient to inform the market that Effex was a related party.

Plaintiffs do, however, have the burden to disaggregate losses caused by disclosures of the truth behind the alleged misstatements from losses caused by non-fraud-related factors, including changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, and other events.

FXCM argues that plaintiffs have failed to disaggregate losses that were caused not by the disclosure of the alleged fraud, but by the disclosure of the regulatory penalties. Plaintiffs contend that the penalties are not confounding events.

I am inclined to allow a jury to decide whether or not these are confounding events that needed to be disaggregated. Unlike events that are undisputedly confounding, such as misstatements by third parties, or a CEO's resignation that could have been caused by a variety of factors, the regulatory penalties here are closely connected to the alleged fraud

itself and to the disclosure of that fraud. Indeed, one could argue that the severity of the regulatory penalties imposed was tied to the nature and severity of the alleged misstatements. In other words, it is not out of the question that a reasonable jury could find that the regulatory penalties relate to the subject or content of the alleged misstatements.

Although the *Barclays* case could be read to suggest that losses from regulatory penalties in response to a fraud should be disaggregated from the losses caused by disclosure of that fraud, the court ultimately concluded that defendant's argument to this effect involved questions of fact. I will also note that this question was not properly before the court given its remand order.

Because plaintiffs' theory is that these losses did not need to be disaggregated, Dr. Werner's analysis will be helpful to the jury if they agree with that theory, and thus should not be excluded.

Indeed, when rejecting a challenge to the jury's verdict in the *Vivendi* case, Judge Scheindlin explained that the credibility of expert testimony that there simply were no confounding events was a matter for the jury, and that a reasonable juror could have found that none of the ostensible confounding events put forth by Vivendi were both non-fraud related and affected Vivendi's share price——further supporting that these are questions for a jury to decide.

Even if the losses caused by the penalties must be disaggregated from the losses caused by the disclosure, I am not persuaded that this would require granting summary.

In *Gould v. Winstar Communications*, 692 F.3d 148, the Second Circuit rejected the argument that summary judgment must be granted in the face of evidence that declines in stock price may have been caused by other facts, holding that such facts, if established, hardly foreclose the reasonable inference that some part of the decline was substantially caused by the disclosures about the fraud itself and concluding that a jury reasonably could find the requisite causal link between the misconduct and the harm suffered. I find this case analogous, as a juror could find that at least some of the stock price drop was due to the disclosure of the fraud itself, rather than due to other factors.

Similarly, the Second Circuit in *Vivendi* concluded that an expert's testimony was relevant as to loss causation because the total amount of actual inflation that he identified was the maximum amount of loss potentially caused by Vivendi's alleged misstatements. 838 F.3d at 260. The court explained that it was up to the jury to determine how much, if any, of the artificial inflation identified by the expert was caused by Vivendi's alleged fraud.

And in considering the jury's verdict in the *Vivendi* case, Judge Scheindlin accepted the possibility that a jury's

reduction of a plaintiff's expert's damages calculation could have been based in whole or in part on the conclusion that some of the defendant's expert's confounding events should have been factored into plaintiff's expert's analysis. 923 F.Supp.2d at 519, n.49.

These cases suggest that even in complex securities litigation, the jury has the capability of disaggregating confounding factors, and that a damages calculation that does not fully disaggregate may still be helpful to a jury so long as the evidence allows the jury to ascribe some rough proportion of the losses to the fraud.

Omnicom, on which FXCM relies, is distinguishable in the Court's view. There, the court granted summary judgment when an expert failed to draw the requisite causal connection between a corrective disclosure and the alleged fraud because his event study merely linked the decline in the value of the company's stock to various events. 597 F.3d 501, at 512. But key to the court's ruling was that the alleged corrective disclosure contained no new information that could have caused the loss. Indeed, the court stated that summary judgment is appropriate only if a plaintiff cannot show that at least some of the price drop was due to the fraud. That's 510, n.3. Here, a reasonable juror could find that at least some rough proportion of the decline in stock price was caused solely by that disclosure.

In short, as the district court in one of the *Vivendi* cases observed, "Plaintiffs need only prove that they suffered some damage from the fraud. Liability obviously does not hinge on how much damage." And that's 634 F.Supp.2d 352, 364.

Finally, plaintiffs have raised sufficient evidence of the loss itself. FXCM's arguments regarding the propriety of Dr. Werner's methodologies, specifically, his constant-dollar methodology, are better suited to challenging his credibility at trial.

And to the extent FXCM continues to rely on the *Comcast* case——which concerns class certification——in its loss and loss causation arguments, this Court already rejected FXCM's reliance on *Comcast* when ruling on class certification.

Next, while it presents a somewhat closer question, I am also denying summary judgment with respect to individual plaintiff 683 Capital.

First, there is evidence that 683 Capital relied on the alleged misstatements. "To prove reliance, the plaintiff must show that but for the material misleading statement or omission, she would not have transacted in the security." That's a quote from one of the *Vivendi* cases, 183 F.Supp.3d, 458, 463. The traditional and most direct way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction based on that specific misrepresentation.

683 Capital's 30(b)(6) representative, Joseph Patt, testified that he reviewed the relevant financial statements. And when Patt was asked whether his investment decision would have changed had FXCM disclosed its relationship with Effex, Patt responded: "I probably would have -- might have paid a lower price, I don't know. It might have been willing to pay a lower price, probably. Because it wasn't what we thought it was. We thought it was an agency business that was providing leverage. Instead it was something else with a lot of risk to potentially operating." And that's exhibit 184, page 151, line 9, through 152, line 5.

While this is far from the strongest evidence of reliance, it is sufficient to survive summary judgment.

Second, I am not persuaded that Dr. Werner's loss causation analysis is irrelevant to 683 Capital's losses. FXCM argues that an event study is irrelevant to determining loss causation on the FXCM notes, because plaintiffs failed to establish that those notes traded in an efficient market. FXCM relies on its own expert, as well as a scholarly article stating that "event study methodology is founded on the efficient market hypothesis." But as another court has noted, "the statement that 'event study methodology has its foundation in the efficient market hypothesis' does not equate with the argument that the stock must trade in an efficient market in order for an event study to have some relevance." *See In re*

Lawrence, 2008 WL 6786807, at *3. What FXCM is raising appears to be a legitimate dispute in the field, on which Dr. Werner takes an opposing position, and that should be resolved by a jury.

Plaintiffs' Section 20(a) claim survives summary judgment. To show control person liability under Section 20(a), a plaintiff must show (1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud. For the reasons discussed, plaintiffs have raised evidence of a primary violation, control of the primary violators by the defendant, and defendants' culpable participation.

Finally, I am denying the motions to seal because the parties do not explain in their letter motions what countervailing privacy interests defeat the *Lugosch* presumption of access. The parties merely cite the privacy they expected when entering into the confidentiality stipulation, but that stipulation explicitly stated that confidential documents would be subject to the Court's requirement for filing documents under seal. So that's insufficient.

This ruling supersedes my prior rulings allowing the temporary sealing of these documents.

So the parties shall file unredacted and unsealed versions of their papers on the docket in the coming days.

So that's my ruling. Thank you again for your patience today. Thank you to the court reporter. Again, you all should reach out to the court reporter's office to get a copy of the transcript so that you have the ruling for your review.

I think what makes sense in terms of next steps is for the parties to meet and confer and submit a letter to me in, let's say a week from today, proposing next steps in the litigation, including your availability for trial. To the extent -- and again, we are on a public line, of course, that is open to the press and the public, but to the extent that you want to engage in settlement discussions, I would be happy to make a referral either to the magistrate judge assigned to the case or to the mediation program. But I am going to leave that to you to tell me what the most productive next step would be.

All right. With all of that said, are there any questions or applications?

MR. LaPOINTE: Your Honor, in your discussion specifically of plaintiffs' burden to disaggregate, you said at one point, or I think I heard you say at one point that part of Dr. Werner's opinion should be excluded, but the rest of the discussions suggest to me that you intended to say should not be excluded. Can you just clarify your ruling whether that portion of the report should be excluded or not?

THE COURT: Give me one second.

MR. LaPOINTE: This is in the discussion of *Barclays* and just before *Gould* and *Vivendi*.

THE COURT: With respect to Werner, I don't think I excluded any of Werner's reports, testimony, or opinions. My analysis of Barron was more nuanced. But with respect to Werner, none of it is being excluded.

MR. LaPOINTE: Thank you, your Honor.

THE COURT: I think the sections that you just referenced were about Barron and not about Werner. I think it would be helpful for you to go through the transcript, and if you do have any questions following your review of the transcript, I would be happy to address them for clarity.

OK. Thank you. I will expect a letter no later than a week from today. And enjoy your weekend. Be well.

(Adjourned)